Supreme Court, U.S.
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In The
Supreme Court of the United States

SOILA CAMACHO; SONIA DENISE GROVER; TEXAS WELFARE REFORM ORGANIZATION; and EL PASO COUNTY HOSPITAL DISTRICT, doing business as R. E. THOMASON GENERAL HOSPITAL,

Petitioners,

v.

TEXAS WORKFORCE COMMISSION, TEXAS HEALTH AND HUMAN SERVICES COMMISSION; and TEXAS DEPARTMENT OF HUMAN SERVICES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Are discretionary state fee-shifting statutes substantive for *Erie* purposes?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Soila Camacho, Sonia Denise Grover, Texas Welfare Reform Organization, and the El Paso County Hospital District, doing business as R.E. Thomason General Hospital, respectfully pray that a writ of certiorari issue to review the March 30, 2006 opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit below.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit, *Soila Camacho v. Texas Workforce Commission*, No. 05-50711 (5th Cir. March 30, 2006), reported at 445 F.3d 407, is reprinted at Appendix App. 1. The U.S. District Court's unreported Order of March 14, 2005 is reprinted at App. 12.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision below, affirming the denial of Petitioners' application for an award of attorneys' fees, was issued on March 30, 2006.

STATUTES INVOLVED

The Texas fee-shifting statute that the Court of Appeals held not substantive for *Erie* purposes, TEX. CIV. PRAC. & REM. CODE § 37.009. **Costs**, provides:

> "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."

The chapter in question is the Texas Uniform Declaratory Judgments Act, which in pertinent part, § 37.004. **Subject Matter of Relief**, provides:

> "A person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder."

TEX. CIV. PRAC. & REM. CODE ch. 37 is reprinted in its entirety at App. 19.

STATEMENT OF THE CASE

1. The merits litigation. Texas state agencies defined Medicaid beneficiaries' "refusing to work" to include failure to keep minor children inoculated and attending school. The Texas agencies announced their intention to cut off Medicaid health insurance to beneficiaries who were, in fact, working. Petitioners Soila Camacho and other Medicaid beneficiaries at risk, the Texas Welfare Reform Organization, which represents Medicaid beneficiaries, and the El Paso, Texas county hospital, heavily dependent on Medicaid payments, sued the Texas state agencies in state district court.

Petitioners sued under TEX. CIV. PRAC. & REM. CODE ch. 37 for declaratory relief concerning the agencies' authority under the Texas and federal Medicaid statutes. Petitioners sought fee-shifting under TEX. CIV. PRAC. &

REM. CODE § 37.009. A private law firm, acting at the request of the Center for Public Policy Priorities on whose behalf the firm had obtained preliminary relief against an earlier emergency rulemaking attempt to cut off Medicaid, and the Texas Legal Services Center, represented the Medicaid beneficiaries and their organization. The El Paso County Attorney's Office represented the hospital. The Welfare Law Center, Inc. was of counsel.

After an adversary hearing, petitioners obtained a temporary restraining order preventing the Texas agencies from cutting off health insurance. On the eve of a temporary injunction hearing, respondents removed to the U.S. District Court for the Western District of Texas.

The federal district court after hearing issued a temporary injunction. The parties agreed that no additional evidence was necessary for final judgment on the merits. The district court entered declaratory judgment for petitioners. Respondents appealed. The Fifth Circuit affirmed. Respondents' statutory construction of "refusing to work" was contrary to the plain meaning of the federal Medicaid act, and not entitled to deference. *Comacho v. Texas Workforce Comm'n*, 408 F.3d 229 (5th Cir. 2005).

2. The Fifth Circuit's fee-shifting decision. Petitioners asked the federal district court to award fees against the Texas state agencies. Under FED. R. CIV. PROC. RULE 54(d)(2) petitioners specified TEX. CIV. PRAC. & REM. CODE § 37.009 as the "statute, rule or other grounds entitling the moving party to the award." Informed by respondents of their intent to oppose any fee award on the grounds that TEX. CIV. PRAC. & REM. CODE ch. 37 is not substantive for purposes of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), petitioners also pled in the alternative to

be permitted under FED. R. CIV. PROC. 59(e) to amend their pleading to assert their claims under 42 U.S.C. § 1983, and for the court to enter the same declaratory judgment and award fees to petitioners as prevailing parties under 42 U.S.C. § 1988.

While the merits appeal was pending, the district court issued an order denying fees. App. 12. The district court held that, under controlling Fifth Circuit precedent, TEX. CIV. PRAC. & REM. CODE ch. 37 is not substantive for *Erie* purposes. The district court held it was too late to amend to invoke 42 U.S.C. §§ 1983 and 1988. Petitioners appealed.

a. The Fifth Circuit's *Utica* approach to whether a fee-shifting statute is substantive under *Erie*. The Fifth Circuit panel considered itself bound to affirm denial of fees under a prior panel opinion, *Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208 (5th Cir. 1998), a federal Declaratory Judgment Act suit for construction of an insurance policy, filed in federal court, in which the defendants prevailed and sought fees. App. 1.

Utica noted that under *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), federal courts "follow the American Rule in the absence of fee-shifting congressional legislation." 138 F.3d at 210. The federal Declaratory Judgment Act does not provide for attorney's fees "that would not otherwise be available under state law." *Id.* *Utica* turned to defendants' argument that fees should be awarded under TEX. CIV. PRAC. & REM. CODE § 37.009. *Utica* held that the Texas fee-shifting statute "is not substantive law." *Id.* "Although the Texas DJA expressly provides for attorney's fees," the panel explained, "it functions solely as a procedural mechanism for

resolving substantive 'controversies which are already within the jurisdiction of the court,'" *quoting Housing Authority v. Valdez*, 841 S.W.2d 860, 864 (Tex. App. – Corpus Christi 1992, writ denied), an opinion that addresses neither *Erie* nor fee-shifting.

b. The Fifth Circuit split on whether the Texas statute is substantive for *Erie* purposes. The Fifth Circuit recognized an internal split on whether TEX. CIV. PRAC. & REM. CODE § 37.009 is substantive for *Erie* purposes. 445 F.3d at 410. Two Fifth Circuit panels held that it is, but two other panels held it is not. *Id.* Under the Fifth Circuit's prior panel rule, "the earliest of conflicting decisions controls." *Id. Utica* was the earliest.

c. A state agency avoiding fee liability by removal. Petitioners urged the panel to distinguish *Utica*. Petitioners noted that the Texas Supreme Court has held TEX. CIV. PRAC. & REM. CODE § 37.009 waives state sovereign immunity from fees, and argued that allowing a state agency by removal to escape fee liability under that state's statute is inappropriate under this Court's decision in *Lapides v. Board of Regents*, 535 U.S. 613 (2002). The Fifth Circuit held that *Lapides* is "inapposite," because both private parties and state agencies will be able by removal to escape TEX. CIV. PRAC. & REM. CODE § 37.009 fee liability. 445 F.3d at 411.

d. The Fifth Circuit's new theory that, under *Chambers v. NASCO*, only fee-shifting statutes limiting fee awards to prevailing parties are substantive for *Erie* purposes. Because petitioners "mount such a vigorous attack on the reasoning of *Utica*," the Fifth Circuit found it "prudent to explain why we

believe *Utica's* holding comports with general *Erie* principles." 445 F.3d at 411-12.

The Fifth Circuit then abandoned *Utica*, agreeing with petitioners that "when courts divide substance from procedure under *Erie*, they should not ordinarily rest on state court opinions characterizing statutes as 'procedural' or 'substantive' in cases unrelated to the *Erie* doctrine." 445 F.3d at 412, n.2. The Fifth Circuit then offered a new test of when a state fee-shifting statute is substantive for *Erie* purposes, based on its reading of *Chambers v. NASCO*, 501 U.S. 32 (1991).

The Fifth Circuit read *Chambers* as requiring federal courts "to apply state attorney's fee law only when it 'embod[ie s] a substantive policy,'" 445 F.3d at 412, *quoting Chambers*, 501 U.S. at 52. TEX. CIV. PRAC. & REM. COD § 37.009, it held, "does not represent 'substantive policy' under *Chambers*." Under *Chambers*, the Fifth Circuit reasoned, "only fee-shifting statutes limiting fee awards to prevailing parties are substantive for *Erie* purposes." *Id.*

REASONS FOR GRANTING THE PETITION

1. This Court has not squarely addressed federal court enforcement of state fee-shifting statutes under *Erie* since 1949.

We live in an age of fee-shifting statutes. There are hundreds of federal fee-shifting statutes.[1] There appear to be thousands of state fee-shifting statutes.[2]

Over the last several decades, this Court has issued many decisions concerning federal fee-shifting statutes, and on the limits upon federal court fee-shifting authority under federal rules and federal courts' inherent powers. Some, including *Chambers*, have discussed various aspects of the relationships between federal and state fee-shifting law.

This Court has not, however, squarely addressed the *Erie* issues involved in federal court enforcement of state fee-shifting statutes since *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[3]

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[1] 3 M. DERFNER & A.WOLF, COURT AWARDED ATTORNEY FEES, chs. 29-42 (Matthew Bender 2005) lists them. A Westlaw search of the United States Code by the Third Circuit "turn[ed] up 327 different statutes." *Bell v. United Princeton Properties, Inc.* 884 F.2d 713, 724 n.10 (3rd Cir. 1989).

[2] COURT AWARDED ATTORNEY FEES does not attempt to provide the court-awarded fee statutes for all 50 states, but ch. 46 sets out 85 Florida and ch. 47 sets out 154 New York court-awarded fee statutes. In a Westlaw search of Texas statutes, we found 904 "hits" for attorneys' fees, of which 638 were fee-shifting statutes.

[3] In *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116 (1974), the Court found that a federal statute controlled, and thus did not reach the twin aims of *Erie* questions about fee-shifting under state law.

Whether "only fee-shifting statutes limiting awards to prevailing parties are substantive for *Erie* purposes" is thus a question of first impression, arising in an important area of law that this Court has not addressed for half a century.

2. Whether "*only* state fee-shifting statutes limiting fee awards to prevailing parties are substantive for *Erie* purposes" presents important questions of federalism and of separation of powers.

When this Court last addressed the *Erie* substance versus procedure distinction as applied to a state fee-shifting statute, it held that a New Jersey statute making an unsuccessful derivative action plaintiff liable for defendants' attorneys' fees applies in federal court under *Erie*. Although "the main action takes the same course," the New Jersey statute "creates a new liability where none existed before," a liability that goes beyond traditional costs. *Cohen v. Beneficial Loan Corp.*, 337 U.S. at 554 (Jackson, J.).

Characterizations of state statutes as procedural or substantive made in non-*Erie* contexts of course do not count for *Erie* purposes, but in general it would seem that "holding a person liable for attorney's fees affects a 'substantive right' no less than holding him liable for compensatory or punitive damages. . . ." *Landgraf v. USI Film Products*, 511 U.S. 244, 292 (1994) (Scalia, J., concurring in the judgments).

The Fifth Circuit, however, says that *Chambers* "suggests" a test under which "only fee-shifting statutes limiting fee awards to prevailing parties are substantive for *Erie* purposes." 445 F.3d at 412. Whether this Court

should adopt such a test is the question presented here. *Chambers* certainly did not do so.

Chambers was not about enforcement in federal court of a state fee-shifting statute. *Chambers* was a case exploring "the scope of the inherent power of a federal court to sanction a litigant for bad-faith conduct" in the absence of a fee-shifting statute. 501 U.S. at 35.

Citing a footnote in *Alyeska*, 421 U.S. at 259, n.31, Chambers had argued that federal courts lack inherent power to sanction bad-faith litigation conduct unless the applicable state law recognizes that exception to the American rule. This Court rejected the argument: "The limitation on a court's inherent power described there applies only to fee-shifting rules that embody a substantive state policy, *such as* a statute which permits a prevailing party in certain classes of litigation to recover fees." 501 U.S. at 52 (emphasis added), *citing People of Sioux County v. National Surety Co.*, 276 U.S. 238 (1928).

The *Chambers* Court then rejected the argument that the twin aims of *Erie* are implicated by a federal court exercising inherent power to assess fees "as a sanction for bad-faith conduct before the court." 501 U.S. at 52-53. Bad-faith litigation conduct sanctions "'are not tied to the outcome of litigation,'" *quoting Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 553 (1991), a decision on Federal Rule 11 sanctions, because they depend "on how the parties conduct themselves during the litigation." *Id.* at 53. For the same reason they present "no risk that the exception will lead to forum-shopping." *Id.* Federal court bad-faith litigation conduct sanctions do not result in inequitable administration of the laws, since "the party, by controlling his or her

conduct in litigation, has the power to determine whether sanctions will be assessed." *Id.*

In stating that state statutes "such as" those that permit prevailing parties to recover fees are substantive for purposes of limiting a federal court's inherent power to shift fees, did this Court intend that "only" prevailing party statutes be deemed substantive for *Erie* purposes?

In holding that the possibility of federal court sanctions for bad-faith litigation conduct will not lead to forum-shopping, did this Court intend to answer the question whether refusing to apply a state fee-shifting statute like the present one will encourage forum-shopping?

Petitioners do not allege bad-faith litigation conduct by respondents or their counsel. The Texas statute does not address bad-faith conduct during litigation. Texas has two other statutes and its own inherent powers doctrine for that purpose. *See* TEX. CIV. PRAC. & REM. CODE chs. 9 and 10, and *In re Bennett*, 960 S.W.2d 35 (Tex. 1997).

Four justices dissenting in *Chambers* thought that the bad-faith sanctions awarded in that case were not limited to conduct during the litigation, and punished prelitigation conduct in ways not permitted under the relevant state law. "The extension of inherent authority to sanction a party's prelitigation conduct subverts the American Rule, and turns the *Erie* doctrine upside down by punishing petitioner's primary conduct contrary to Louisiana law." 501 U.S. at 61 (Kennedy, J., dissenting). "The American Rule recognizes that the Legislature, not the Judiciary, possesses constitutional responsibility for defining sanctions and fees," with only a narrow exception for bad-faith litigation conduct. *Id.* at 63. The "so-called American Rule" does not in principle bar fee shifting as a sanction

for procedural abuse, but it "prevents a court (without statutory authorization) from engaging in what might be termed *substantive* fee shifting, that is, fee shifting as a part of the merits award," and thus the district court had no power to impose sanctions even for flagrant, bad-faith breach of contract. 501 U.S. at 59 (Scalia, J., dissenting) (emphasis in original).

The question presented in this case is whether a state fee-shifting statute is "substantive fee shifting" for *Erie* purposes when the award it provides for is part of the merits award, rather than a sanction for bad-faith litigation conduct. *Chambers* does not answer this question, but does demonstrate that it raises important issues both of federalism and of separation of powers.

a. State Fee-Shifting and Federalism Under *Erie*. The federalism issue is whether federal court refusal to enforce state fee-shifting statutes because they provide too much judicial discretion would turn *Erie* upside down. *Erie*, its progeny, and the Rules of Decision Act all rest on the constitutional premise that federal courts apply substantive state statutes unless they substantially conflict with federal policy as set out in an applicable provision of the federal constitution, a federal statute, or a federal rule validly adopted under the Rules Enabling Act. If it is difficult to tell whether a state statute is substantive or procedural for *Erie* purposes, a federal court should implement "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1963).

Here a federal court will not enforce in favor of a fully prevailing plaintiff a state legislature's decision to authorize courts to award fees because the statute, as worded and construed by the state's highest court, would also permit awards, in other cases, to parties who have not substantially prevailed. As a result, under the Fifth Circuit's *Erie* test, parties who would have been awarded fees if the case had remained in state court will not be awarded fees after removal to federal court.

b. Effect on forum-shopping. Without citation to law, data or economic analysis, the Fifth Circuit asserts its belief that federal court refusal to enforce discretionary state fee-shifting statutes will not promote forum-shopping. "Any mechanism for redistributing costs," however, "even the inherent sanctioning authority of the federal courts, has the potential to affect decisions concerning where to file suit," and the impact is likely to be greater, not smaller, when the potential fee-shifting is not limited to sanctions for bad-faith litigation conduct or frivolous claims. *Business Guides, Inc.*, 498 U.S. at 566 (Kennedy, J., dissenting).

Would not adoption of the Fifth Circuit's test at least encourage those defendants sued in state court who think the risk of an adverse declaratory judgment is high, and who expect a state court would find it equitable and just to award fees against them, to remove? Would not the Fifth Circuit's test at least encourage plaintiffs in such cases to structure their complaints to prevent removal, or to invoke a fee-shifting statute whose applicability would not be affected by removal? Much more analysis seems warranted.

The removal circumstances here highlight the *Erie* aim of discouraging forum-shopping. Here (as often in statutory construction or validity declaratory judgment actions) plaintiffs won a declaratory judgment against a state agency. Here the state legislature had removed the agencies' sovereign immunity from such fees. *Texas Education Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994). By removal the agencies under the Fifth Circuit's test avoid liability for fees that the state legislature intended courts to award when "equitable and just." To preserve its claim to a fee award in a statutory construction declaratory judgment action against the state agency, under the Fifth Circuit's *Erie* test the plaintiff must upon removal amend its pleading to sue under 42 U.S.C. § 1983, employing the *Ex parte Young*[4] fiction and naming the individual members of the state agencies as defendants.

In *Lapides*, this Court held that a state agency cannot remove to federal court and then assert Eleventh Amendment immunity. Here the state agency that removed is not asserting immunity from fees, but the result – a state agency avoiding by removal to federal court state statutory fee liability for which the state has waived its immunity – is similarly if not more "anomalous or inconsistent." 535 U.S. at 619.

c. Effect on equitable administration of the laws. Why should discretionary federal fee-shifting statutes be enforceable in federal court, and discretionary state fee-shifting statutes be enforceable in state court, but discretionary state fee-shifting statutes be unenforceable in federal court?

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[4] 209 U.S. 123 (1908).

The circumstances here highlight the potential for inequitable administration of the laws. In *Leeper*, home-schooling parents won declaratory and injunctive relief concerning compulsory attendance statutes, and attorneys fees. Why should removal by the state agencies in this case lead to a different result for Medicaid beneficiaries?

d. State fee-shifting statutes and separation of powers. The Fifth Circuit held that TEX. CIV. PRAC. & REM. CODE § 37.009 "does conflict with a federal policy: the 'American Rule' that 'parties are ordinarily required to bear their own attorney's fees.'" 445 F.3d at 412, *quoting Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). Is this approach analytically consistent with separation of powers?

As a general proposition, "the allocation of costs accruing from litigation is a matter for the legislature, not the courts." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). The American rule is a common law rule or practice. Every fee-shifting statute, whether limited to prevailing parties or more discretionary, makes an exception to the American rule. State legislatures, no less than Congress, possess constitutional power to decide when to make an exception to the American rule and authorize shifting of fees.

At this point the federalism and separation of powers questions presented merge. Unless and except to the extent Congress makes the American rule a matter of federal statutory law, is not the range of discretion in state fee-shifting statutes a matter for state legislatures to determine? May not a state legislature, no less than Congress, have reasons to enact a discretionary fee-shifting

statute? If it does so, are not courts, both federal and state, duty-bound to respect the legislature's decision?

3. This case affords the Court an opportunity to address how federal courts should deal with discretionary state fee-shifting statutes, as it has done with discretionary federal fee-shifting statutes.

The Fifth Circuit is troubled by the large measure of fee-shifting discretion the Texas legislature gives courts: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. Congress, however, has provided substantial discretion in many federal fee-shifting statutes. When Congress is making an exception to the American rule, under separation of powers, both "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska*, 421 U.S. at 262.

a. Federal courts do not refuse to enforce discretionary federal fee-shifting statutes. Federal fee-shifting statutes often leave fee awards to the district court's discretion, with "little guidance" as to how to exercise that discretion. That "does not mean that no legal standard governs." *Martin v. Franklin Capital Corp.*, ___ U.S. ___, 126 S.Ct. 704, 707, 710 (2005). "'Although the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits.'" *Id.* at 710, *quoting Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989). "When applying fee-shifting statutes, 'we have

found limits in "the large objectives" of the relevant Act, which embrace certain "equitable considerations."'" *Id.*, *citing Zipes*, 491 U.S. at 759. Even once a standard is determined in light of the particular statute's large objectives, "district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." 126 S.Ct. at 711. "'[A]s is always the case when an issue is committed to judicial discretion, the judge's decision must be supported by a circumstance that has relevance to the issue at hand.'" *Id.*, *quoting Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189, 196, n. 8 (1995).

The "large objectives" of this Texas statute and the "equitable considerations" this statute embraces explain the breadth of the discretion it provides. The Texas statute applies to all declaratory judgment actions concerning the construction or validity of a statute (as well as to actions concerning the construction or validity of a will, deed, or contract). *See* TEX. CIV. PRAC. & REM. CODE § 37.004. Declaratory judgment actions concerning statutes may be brought, as here, by Medicaid beneficiaries who live on less than $300 per month and cannot pay attorneys to sue to prevent the cut-off of their health insurance. Such plaintiffs may prevail, as they did here, and it may well seem at least presumptively equitable and just that they, like federal civil rights plaintiffs, be awarded fees, absent special circumstances. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (*per curiam*). Other such plaintiffs may lose. Again by analogy to federal civil rights litigation, it may seem equitable and just to limit fee awards in favor of the defendant government to cases in which such losing plaintiffs' claims were frivolous,

unreasonable, or groundless. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Statutory construction or validity declaratory judgment actions, moreover, also include other cases that are not analogous to civil rights actions. Some are more like cases under the Copyright Act, which provides that a court "may also award a reasonable attorney's fee to the prevailing party as a part of the costs." 17 U.S.C. § 505. Copyright Act cases may be brought by "starving artists," or by, against or between "corporate behemoths," able to afford the best counsel and seeking to vindicate valuable commercial rights. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994). Regardless of the poverty or wealth of the parties on either side, meritorious Copyright Act litigation serves the interest of the general public. *Id.* at 527. There is, accordingly, no reason to assume that Congress intended by 17 U.S.C. § 505 to do more than modify "the American Rule to allow an award of attorney's fees in the court's discretion." *Id.* at 534. In such litigation, "attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion," a matter for which there is "'no precise rule or formula,'" but instead a judicial duty to exercise "equitable discretion." *Id.*

The Fifth Circuit's proposed *Erie* test at issue here is that only state statutes limiting fee awards to prevailing parties are substantive for *Erie* purposes. Under that test, a state fee-shifting statute, because it calls for the exercise of "equitable discretion," as the Copyright Act does, would not be enforceable in federal court, though the Copyright Act would be.

b. How essential is it for *Erie* purposes that a state statute limit fee awards to prevailing parties? Many federal statutes do not expressly limit awards to prevailing parties.[5] This Court's decisions illustrate the approaches available to a court charged with applying such a statute.

The federal Clean Air Act, for example, contains two fee-shifting provisions that, like the Texas statute, do not in terms limit awards to prevailing parties: "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines that such award is appropriate." 42 U.S.C. § 7604(d). "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." 42 U.S.C. § 7607(f).

c. Of what *Erie* significance is the possibility in other cases of an award to a losing party? This Court has held that it can never be "appropriate" to award fees to a party who has obtained no relief at all, unless the statute clearly expresses that intent, and that Congress did not in §7607(f) of the Clean Air Act intend to carve out the extraordinary exception to the American Rule of authorization for a losing party to be awarded fees against the winning party. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-694 (1983).

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[5] 1 M. DERFNER AND A. WOLF, COURT AWARDED ATTORNEY FEES (Matthew Bender & Co. 2005) at ch. 8, Eligibility; The Outcome Factor; "Prevailing Party" Requirement, para. 8.02[2] collects a number of such statutes.

The Texas Supreme Court has not yet ruled on whether the Texas Legislature did intend in TEX. CIV. PRAC. & REM. CODE § 37.009 to carve out such an extraordinary exception to the American Rule. The Texas Supreme Court has only remarked that such awards do not depend upon "a finding that a party 'substantially prevailed.'" *Barshop v. Medina County Underground Water Conserv. Dist.*, 925 S.W.2d 618, 637 (Tex. 1996). The facts help explain the remark and remand of the fee issue to the trial court's discretion, and clearly the court thought the extent of the plaintiffs' success was a factor to be evaluated and taken into account in deciding whether to award any fees to either side.[6]

The Texas Supreme Court since *Barshop* has shed only a little light on the circumstances under which it would be "equitable and just" to award fees. In no case has it appeared to countenance an award to a party without some indication of appreciable relief in that party's favor.[7]

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[6] Plaintiff landowners had challenged a new state statute providing for regulation of groundwater. The Texas Supreme Court had reversed a declaratory judgment that the statute was unconstitutional. To do so it interpreted a crucial statutory requirement that all users file definitive declarations of historical use by a stated date as merely directory, giving landowners much more time. *Id.* at 628-29. Therefore it "may" no longer be correct that plaintiffs substantially prevailed. *See* 925 S.W.2d at 637-38.

[7] In *Bocquet v. Herring*, 972 S.W.2d 19 (Tex. 1998), the Texas Supreme Court upheld an award of fees in favor of the prevailing counterclaim defendant. The Texas Declaratory Judgments Act "does not require an award of attorney fees to the prevailing party," but instead "affords the trial court a measure of discretion in deciding whether to award attorney fees or not." *Id.* at 20. It "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirement that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Id.* at 21. In *Brooks v.*

(Continued on following page)

One possibility is that the Texas Supreme Court may under TEX. CIV. PRAC. & REM. CODE § 37.009 allow a "catalyst" award, to a party who, by declaratory judgment action, has caused a state agency to abandon a challenged construction of the statute, though the change is not reflected in a judgment or consent decree. This Court was closely divided on whether federal statutes that expressly authorize fees only to "prevailing parties" allow awards to a party who has achieved some of the results sought through the defendant's voluntary cessation of the challenged conduct, but who has not won a judgment or a consent decree.[8] Each state is presumably free to decide this question by statute, and to reach a different answer.

Northglen Association, 141 S.W.3d 158 (Tex. 2004), concerning the powers of a homeowners' association under the Texas Property Code, "each side pursued legitimate interests," and each side won in part and lost in part, so the Texas Supreme Court declined to disturb the trial court's refusal to award fees to either side. *Id.* at 171-72. In *Neeley v. West Orange-Cove Consolidated Ind. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2006), a challenge to the constitutionality of Texas school finance statutes involving many plaintiff school districts and many intervenor school districts, the Texas Supreme Court "concluded that the plaintiffs are entitled to only a part of the relief granted by the district court, and that the intervenors are entitled to no relief." On this basis "we reverse the award of attorney fees and remand the case to the district court to consider what award of attorney fees, if any, is appropriate. We express no opinion on this issue." *Id.* at 799.

[8] *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001). All federal courts of appeals but one had held that "prevailing party" statutes allow such "catalyst" fee awards. 532 U.S. at 626-27 (Ginsburg, J., dissenting). Under federal statutes like the Clean Air Act or the Endangered Species Act, which do not contain an express prevailing party requirement, the catalyst theory may remain available. *Association of Cal. Water Agencies v. Evans*, 386 F.3d 879, 884-85 (9th Cir. 2004), and *Loggerhead Turtle v. County Council of Volusia Cty.*, 307 F.3d 1318, 1325-27 (11th Cir. 2002).

The Fifth Circuit states that certain intermediate Texas courts of appeal have awarded fees to losing parties. In two cases, the characterization of the party awarded fees as the losing party is at best doubtful, and in each case facts made the award at least arguably equitable and just.[9] The Fifth Circuit acknowledges that whether there are any such cases is not really relevant. The Texas fee statute fails the Fifth Circuit's test of what state fee-shifting statutes will be applied in federal court simply because its text and the Texas Supreme Court's decisions do not squarely rule out the possibility of an award to a losing party.

There should be nothing shocking to a federal court's *Erie* conscience about a statute authorizing such awards of

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[9] In *McClendon v. McClendon*, 862 S.W.2d 662 (Tex. App. – Dallas 1993, writ denied), for example, beneficiaries sued executors of an estate for breaches of fiduciary duty. An executor counterclaimed for declaratory judgment, contending that the suit violated an *in terrorem* clause in the will. A beneficiary then asked for a declaration that the clause did not apply. The trial court awarded the beneficiaries compensatory damages, exemplary damages, and, although it denied all other relief, presumably including declaratory judgment, nearly $1 million in attorneys' fees. The court of appeals noted that, in its intermediate appellate district, the beneficiaries did not have to be prevailing parties on the declaratory judgment to recover fees. In addition, however, the court held the fees not segregable by cause of action and ordered the trial court's judgment modified to provide that the beneficiaries' causes of action did not come within the prohibitions of the *in terrorem* clause. 862 S.W.2d at 672-74, 678-79.

In *Blue Cross Blue Shield v. Duenez*, ___ S.W.3d ___, 2005 WL 1244609 (Tex. App. – Corpus Christi 2005, pet. filed), the parents of a child in a semi-vegetative state sued for declaratory judgment that her care was covered under their Blue Cross policy. They obtained a temporary injunction, which was affirmed on interlocutory appeal. The husband then changed employment, and his insurance provider changed. The court of appeals affirmed the attorneys' fee award. Blue Cross has petitioned for Texas Supreme Court review.

costs and attorneys' fees as are "equitable and just." This statutory language invokes or echoes not the common law, under which costs were awarded to prevailing parties, but equity. "[A]n equity court could award costs 'as the equities of the case might require,'" and this is "a matter resting in the sound discretion of the court." *Buckhannon*, 532 U.S. at 612 (Scalia, J., concurring) (citations omitted).

4. States and litigants need to know what state fee-shifting statutes federal courts will enforce.

A federal court, sitting for *Erie* purposes as the Texas statutory attorneys' fee-shifting analogue to a court of equity, can decline any request for fees made by a losing party that does not, to that federal court, seem "equitable and just" in light of the purposes of the statute and the circumstances of the case, as well as reasonable and necessary in amount. Is that discretion (and appellate review of its exercise) not sufficient protection for *Erie* purposes? Is it necessary or appropriate for *Erie* purposes that federal courts refuse to apply the state fee-shifting statute in cases in which it is clearly equitable and just to do so, because of the possibility that state courts may exercise equitable discretion inappropriately?

No request by a losing party for a discretionary fee award is at issue in this case. If a federal court were confronted with a request for a fee award in favor of the losing party to a Texas statutory construction or validity declaratory judgment action, under *Erie* would it not be the duty of the federal court to guess what the Texas

Supreme Court would decide, or to certify the question to that court[10]?

If not, then states need to know what statutory fee-shifting language will be effective in federal courts. If the Texas statutory language is too discretionary for *Erie* purposes, state legislatures need to know what language is required.

Litigants also need to know what state fee-shifting statutes will be applied in federal courts. They need that information in order to decide what cases to remove, or move to remand, and to frame their cases to make it possible to seek, or avoid, fee awards.

In this case it is undisputed that petitioners could have amended their complaint upon removal to federal court to invoke 42 U.S.C. § 1983. It is clear that, had they done so, they would have been presumptively entitled as prevailing parties to fees under 42 U.S.C. § 1988. Amending to invoke 42 U.S.C. §§ 1983 and 1988 would have required naming the individual commissioners of the state agencies as defendants. It would have further delayed the progress of the removed case, and added even more to its costs (both for plaintiffs' amendment and for defendants' federal court answer, much more detailed than the general denial permitted in Texas state court and on file before removal). Should this Court adopt an *Erie* test that would require future such plaintiffs to weigh these factors against the impact on potential fees?

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[10] Under TEX. CONST. ART. 4 § 3c and TEX. R. APP. P. 58.1, on certification by any federal appellate court the Texas Supreme Court may answer determinative questions of Texas law having no controlling Texas Supreme Court precedent.

5. This case is well-suited to determine *Erie* boundaries on state fee-shifting statutes.

Conflicts among the federal courts of appeal on whether any particular state fee-shifting statute is substantive for *Erie* purposes are unlikely. Each state fee-shifting statute will normally be invoked in a case filed in or removed to the federal courts for the circuit that includes the state. With respect to TEX. CIV. PRAC. & REM. CODE § 37.009, the conflicts are inside the Fifth Circuit, and were resolved only by an internal prior panel rule. "Two panels of this Court subsequent to *Utica* reached the opposite result and applied the [Texas] DJA [fee-shifting statute] in federal court. *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 604 (5th Cir. 2000); *In re Garza*, 2004 WL 249596, *4 (5th Cir. Feb. 10, 2004) (unpublished)." 445 F.3d at 410. "Two other post-*Utica* panels have reaffirmed the viability of *Utica* and held that this Court's precedent forecloses the use of the DJA in federal court. *See Olander v. Compass Bank*, 363 F.3d 560, 567-68 (5th Cir. 2004); *Van v. Anderson*, 66 Fed. Appx. 524 (5th Cir. 2003) (unpublished)." *Id.*

The factual circumstances also make this case especially appropriate to determine whether discretionary fee-shifting statutes are substantive for *Erie* purposes. This Court would not be called upon to decide whether, under Texas law, petitioners would be awarded fees in this case, only to remand for district court consideration under *Erie* of that question.

Petitioners are precisely those to whom it is presumptively "equitable and just" to award fees as authorized in the statute under which they sued. They are poor, and could not afford to pay their own fees. They served as private attorneys general, seeking and obtaining a statutory construction declaratory judgment that preserves

the health insurance of thousands of Medicaid beneficiaries. They prevailed fully. Under Texas law, they would have been entitled in Texas state court to a determination of whether it was equitable and just to award them fees, and if so, what amount is reasonable and necessary. This Court can and should decide and explain whether, under *Erie*, they are entitled to the same exercise of judicial discretion by a federal district court.

CONCLUSION

Whether only state fee-shifting statutes that limit awards to prevailing parties are substantive for *Erie* purposes is a question of first impression, raising important issues of federalism and separation of powers, and with practical ramifications for state legislatures, litigants and federal courts. For the reasons stated in this petition, this Court should grant review of the decision below.

Respectfully submitted,

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445 F.3d 407

United States Court of Appeals, Fifth Circuit.
Soila CAMACHO, Sonia Denise Grover, Texas Welfare Reform Organization, El Paso County Hospital District d/b/a R.E. Thomason General Hospital,
Plaintiffs-Appellants,
v.
TEXAS WORKFORCE COMMISSION, Texas Health And Human Services Commission, and Texas Department of Human Services,
Defendants-Appellees.
No. 05-50711.

March 30, 2006.

P.M. Schenkkan (argued), Austin, TX, for Plaintiffs-Appellants.

William David Iverson (argued), Covington & Burling, Washington, DC, Nancy Kathleen Juren, Asst. Atty. Gen., Austin, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before KING, SMITH and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

After successfully challenging rules adopted by the Texas Workforce Commission and successfully defending that judgment before this Court, Appellants sought attorney's fees. The district court denied their application. The parties are now before us again, but this time the sole issue on appeal is whether the district court erred under *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), by refusing to apply the fee-award

provision of the Texas Declaratory Judgment Act. We affirm, finding Appellants' claim foreclosed by precedent directly on point: *Utica Lloyd's of Texas v. Mitchell,* 138 F.3d 208 (5th Cir.1998).

I. BACKGROUND

The Appellants, Soila Camacho, Sonia Denise Grover, Texas Welfare Reform Organization, and El Paso County Hospital District sued the Appellees, Texas Workforce Commission, Texas Health and Human Services Commission, and Texas Department of Human Services in state court. Appellants challenged rules adopted in 2003 by the Texas Workforce Commission which limited eligibility for Medicaid health coverage. They sought relief under the Texas Declaratory Judgment Act ("DJA"). Appellees removed to federal court, asserting federal question jurisdiction. The district court invalidated the rules at issue, holding that they were contrary to the plain meaning of the Medicaid statute. We affirmed. *See Comacho v. Texas Workforce Comm'n,* 408 F.3d 229 (5th Cir.2005).

Appellants then filed an application for attorney's fees in the district court. They specified the fee award provision of the DJA as the statute entitling them to the award. *See* Tex. Civ. Prac. & Rem.Code § 37.009 (Vernon 1997). Section 37.009 provides, "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." The district court denied the application, citing Fifth Circuit precedent holding that the DJA is a procedural statute that does not apply in federal court. This appeal followed.

II. STANDARD OF REVIEW

We review a denial of attorney's fees for abuse of discretion. *Adams v. Unione Mediterranea Di Sicurta,* 364 F.3d 646, 656 (5th Cir.2004). Underlying questions of law, like the *Erie* question presented here, are reviewed *de novo. Id.*

III. DISCUSSION

A. *Utica Lloyd's of Texas v. Mitchell*

Under *Erie,* federal courts apply state substantive law "to any issue or claim which has its source in state law." C. Wright, A. Miller, & E. Cooper, 19 Federal Practice and Procedure (2d ed.2002) § 4520. Yet, federal law, rather than state law, invariably governs procedural matters in federal courts. *E.g., Motorola Communic's & Elec., Inc. v. Dale,* 665 F.2d 771, 774 (5th Cir.1982). In *Utica,* this Court squarely held that the DJA is procedural for *Erie* purposes: "a party may not rely on the Texas DJA to authorize attorney's fees in a diversity case because the statute is not substantive law." 138 F.3d at 210.[1]

Two panels of this Court subsequent to *Utica* reached the opposite result and applied the DJA in federal court. *Kona Tech. Corp. v. S. Pac. Transp. Co.,* 225 F.3d 595, 604 (5th Cir.2000); *In re Garza,* 90 Fed.Appx. 730, 2004 WL

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[1] *Utica* is not distinguishable on the ground that this case arrived in federal court via federal question, rather than diversity, jurisdiction. The statement in *Utica* that the DJA does not apply in "a diversity case" likely reflects the frequently assumed, but erroneous, proposition that *Erie* applies only in diversity cases. "The *Erie* case and the Supreme Court decisions following it apply in federal question cases as well." Wright, Miller & Cooper, *supra,* page 3, § 4520.

249596, *4 (5th Cir. Feb.10, 2004) (unpublished). Neither of these decisions affects the precedential value of *Utica* because the earliest of conflicting panel decisions controls. *See Southard v. Texas Bd. of Criminal Justice,* 114 F.3d 539, 549 (5th Cir.1997). Two other post-*Utica* panels have reaffirmed the viability of *Utica* and held that this Court's precedent forecloses the use of the DJA in federal court. *See Olander v. Compass Bank,* 363 F.3d 560, 567-68 (5th Cir.2004); *Van v. Anderson,* 66 Fed.Appx. 524 (5th Cir. Apr. 14, 2003) (unpublished).

B. *UTICA* AND *OLANDER* ARE NOT DISTINGUISHABLE

Appellants maintain that *Utica* and *Olander* can be distinguished. They point out that the instant case involves a challenge brought against state agencies, whereas *Utica* and *Olander* were disputes between private parties. They contend that this distinction is important because Texas has decided to waive its sovereign immunity to allow private parties to recover attorney's fees against the state in declaratory judgment actions. *See Texas Educ. Agency v. Leeper,* 893 S.W.2d 432, 446 (Tex.1994). Because a state's waiver of sovereign immunity is a fundamental policy decision, they argue, state agencies should be susceptible to awards of attorney's fees under the DJA in federal court.

Appellants' effort to distinguish *Utica* and *Olander* is not persuasive. The intention of a state in waiving sovereign immunity is that the state "be treated in the same manner as any private litigant." *Driskill v. State,* 787 S.W.2d 369, 370-71 (Tex.1990); *see also United States v. Orleans,* 425 U.S. 807, 814, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976) ("The Federal Tort Claims Act is a limited waiver of

sovereign immunity, making the Federal Government liable *to the same extent as a private party* for certain torts.") (emphasis added). A government that has waived sovereign immunity is entitled to "assert the same defenses available to private citizens." *Starnes v. United States,* 139 F.3d 540, 542 (5th Cir.1998). Refusing to extend *Utica* and *Olander* to Texas agencies would treat the state differently than private litigants, who, under those precedents, are not subject to attorney's fees awards. Accordingly, applying *Utica* and *Olander* to cases involving the state is perfectly consistent with Texas's waiver of sovereign immunity.

Appellants argue that the Supreme Court's recent decision in *Lapides v. Board of Regents* requires us to carve out an exception to *Utica.* 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002). We disagree. *Lapides* held that a state waives its sovereign immunity when it removes a case from state court to federal court. The Supreme Court noted that it would "seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Id.* at 619, 122 S.Ct. 1640. There is no comparable anomaly in the instant case. Appellees did invoke federal jurisdiction by removing the case to federal court, but they did not simultaneously deny the same. Indeed, Appellees do not argue any form of sovereign immunity defense. Furthermore, contrary to Appellants' claim, Appellees have not effectively "regained" their sovereign immunity by removing to federal court. Appellees were treated exactly like private parties in federal court. In short, this

case falls squarely within the holdings of *Utica* and *Olander,* and the Supreme Court's *Lapides* decision is inapposite.

C. *UTICA* DOES NOT CONFLICT WITH PRIOR PRECEDENT

Appellants also argue that *Utica* is not binding because it conflicts with prior precedent. Appellants contend that *Utica* failed to conduct a proper *Erie* analysis, as required by this Court's prior opinions. "Whether a particular provision is substantive or procedural for *Erie* purposes is determined by looking to the 'twin aims' of the *Erie* doctrine: the discouragement of forum shopping and the avoidance of inequitable administration of the laws." *Herbert v. Wal-Mart Stores,* 911 F.2d 1044, 1047 (5th Cir.1990). Because *Utica* made no such analysis, Appellants argue, "it is of no effect."

Published panel opinions are ordinarily binding on subsequent panels. Completely disregarding decisions under the "conflict exception" is a disfavored practice that is to be avoided if possible. *See United States v. Alvarado-Santilano,* 434 F.3d 794, 798 (5th Cir.2005). If Appellants' argument were to succeed, it would represent a serious erosion of the principle of precedent and a dramatic expansion of the conflict exception. Appellants argue that *Utica* is inconsistent with general *Erie* principles and that *Utica*'s "analysis" was wrong. They do not, however, point to any case that contradicts *Utica*'s specific holding that the DJA is procedural. Disregarding precedent where it arguably conflicted with general principles or employed flawed analysis would invite parties to re-argue the merits of every prior panel decision. This is because to ask whether a prior decision's analysis was correct is essentially to ask

whether it was rightly decided. Thus, we reject Appellants' effort to undermine the precedential effect of *Utica* by referencing broad principles of *Erie* analysis.

Appellants also argue that *Utica* conflicts more specifically with this Court's earlier decision in *Ashland Chemical Inc. v. Barco Inc.*, 123 F.3d 261 (1997). Appellants contend that *Ashland* held that refusing to apply fee-shifting statutes in federal court would result in forum shopping and that such statutes are substantive for *Erie* purposes. Appellants misread *Ashland*. First, *Ashland* recognized, as has the Supreme Court, that not all state attorney's fees laws are applicable in federal court under *Erie*. *Id.* at 265. Second, *Ashland* did not state, much less hold, that all fee-shifting rules implicate the problem of forum shopping. Rather, it expressed this concern only about the specific attorney's fees law at issue in that case. *Id.* at 265 n. 3 ("The Local Rule . . . implicates the *Erie* problem of forum shopping."). The Supreme Court has taken a nuanced approach in determining whether particular attorney's fees laws are procedural or substantive under *Erie*. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Accordingly, the statement in *Ashland*, regarding a law not at issue here, does not undermine *Utica*. In sum, *Utica* is binding because Appellants have not identified a prior decision that conflicts with its specific holding that the DJA is procedural for *Erie* purposes.

D. *UTICA*'S HOLDING FOLLOWS FROM GENERAL *ERIE* PRINCIPLES

We need not go further to affirm the judgment of the district court. *Utica* is good law and is not distinguishable

from the case at bar. Nevertheless, since Appellants mount such a vigorous attack on the reasoning of *Utica,* we find it prudent to explain why we believe *Utica*'s holding comports with general *Erie* principles.

Appellants argue that a correct *Erie* analysis[2] compels the conclusion that the DJA applies in federal court. They contend that (1) no federal statute, rule, or policy conflicts with the DJA and (2) failing to apply the DJA in federal court would promote forum shopping and cause the inequitable administration of the laws. *See Hanna v. Plumer,* 380 U.S. 460, 465-68, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). These arguments fail.

The DJA does conflict with a federal policy: the "American Rule" that "parties are ordinarily required to bear their own attorney's fees." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't Health & Human Res.,* 532 U.S. 598, 602, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). In light of the American Rule, generally applied in federal court, we have been instructed that state law does not always control the issue of attorney's fees. *See Chambers,* 501 U.S. at 51-52, 111 S.Ct. 2123. Rather, we are to apply state attorney's fee law only when it "embod[ies] a substantive policy." *Id.* at 52, 111 S.Ct. 2123.

The DJA does not represent "substantive policy" under *Chambers.* The Supreme Court explained in *Chambers* that substantive fee-shifting statutes include those

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[2] We agree with Appellants that, when courts divide substance from procedure under *Erie,* they should not ordinarily rest on state court opinions characterizing statutes as "procedural" or "substantive" in cases unrelated to the *Erie* doctrine. *See Guaranty Trust Co. v. York,* 326 U.S. 99, 108-09, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945).

"which permit[] a prevailing party in certain classes of litigation to recover fees." *Id.* Thus, laws requiring fee awards for prevailing parties in actions to enforce an insurance policy are substantive for *Erie* purposes. *Id.* By contrast, laws providing for fees due to an opponent's bad-faith litigation tactics are procedural. *Id.* at 53, 111 S.Ct. 2123. In reaching this conclusion, the Supreme Court emphasized that bad-faith fee awards were "not tied to the outcome of litigation." *Id.*

Fifth Circuit decisions following *Chambers* recognize that only fee-shifting statutes limiting fee awards to prevailing parties are substantive for *Erie* purposes. In *Ashland,* this Court held that the fee-shifting rule at issue there was substantive because "unlike the imposition of bad-faith sanctions in *Chambers,* [the award was] tied to the outcome of the case." 123 F.3d at 265. Similarly, in *Exxon Corp. v. Burglin*, we distinguished fee-shifting statutes "that hinge an award on success in the underlying lawsuit" from those that do not. 42 F.3d 948, 951 (5th Cir.1995). "This difference tracks the blurry line between substance and procedure in *Erie* and the Rules Enabling Act." *Id.* at 952.

The "tied to the outcome" test suggested by the Supreme Court in *Chambers* reflects the more general policy concerns expressed in *Hanna.* Where an award of attorney's fees is discretionary and does not depend on the outcome of the case, it is difficult for a party to predict whether the law will result in an additional benefit or an additional liability. We do not believe that parties would select their forum based upon the availability of such a law. Nor does refusing to enforce such a law in federal court result in the inequitable administration of the laws. *See Chambers,* 501 U.S. at 53, 111 S.Ct. 2123.

Turning back to the statute at issue here, the DJA does not tie fee awards to the outcome of litigation. The Texas Supreme Court has held that fee awards under the DJA do not depend upon a finding that a party "substantially prevailed." *Barshop v. Medina County Underground Water Conserv. Dist.,* 925 S.W.2d 618, 637 (Tex.1996). Rather, the DJA provides the trial court "a measure of discretion" to decide when awarding fees is "equitable and just." *Bocquet v. Herring,* 972 S.W.2d 19, 20-21 (1998). In its discretion, a trial court may "grant attorney's fees to the nonprevailing party." *Cartwright v. Cologne Production,* 182 S.W.3d 438, 2006 WL 22681, *6 (Tex.App. – Corpus Christi Jan.5, 2006, no pet.); *see generally* 16 Tex. Jur. § 66 (2006) (collecting cases holding that "attorney fees [under the DJA] are discretionary and can be awarded to either party, even a non-prevailing party").

At oral argument, Appellants contended that no Texas court has ever affirmed fees awarded to a nonprevailing party. Given the clear language in the cases cited above, we doubt the relevancy of this contention. In any event, it is incorrect. *See Maris v. McCraw,* 902 S.W.2d 191 (Tex.App. – Eastland, 1995, writ denied); *McLendon v. McLendon,* 862 S.W.2d 662 (Tex.App. – Dallas, 1993, writ denied) (affirming an award of more than $1 million in attorney's fees to the plaintiffs even though "[t]he trial court denied the declaratory relief sought"); *Blue Cross Blue Shield of Texas v. Duenez,* 2005 WL 1244609 (Tex.App. – Corpus Christi, May 26, 2005, pet. filed) (mem.op.).[3] Based on the foregoing reasons, we conclude

[3] Appellants cite a single case from an intermediate Texas court of appeals which suggests that only "the prevailing party" may be "entitled" to attorney's fees under the DJA. *Anderson Mill Util. Dist. v.*

(Continued on following page)

that the DJA is procedural for *Erie* purposes under *Chambers* and its Fifth Circuit progeny.

IV. CONCLUSION

We have considered Appellants' efforts to escape the rule of *Utica Lloyd's of Texas v. Mitchell* and found them inadequate. Accordingly, the district court's judgment denying attorney's fees is AFFIRMED.

Robbins, ___ S.W.3d ___, 2005 WL 2170355, *6 (Tex.App. – Austin, Sep. 8, 2005, no pet.). As shown above, this is contrary to the weight of Texas authority and, more importantly, to rulings of the Texas Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SOILA CAMACHO, SONIA DENISE GROVER, TEXAS WELFARE REFORM ORGANIZATION, EL PASO COUNTY HOSPITAL DISTRICT d/b/a R.E. THOMASON GENERAL HOSPITAL,

Plaintiffs

-vs-

TEXAS WORKFORCE COMMISSION, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, and TEXAS DEPARTMENT OF HUMAN SERVICES,

Defendants

Case No. A-04-CA-017-SS

ORDER

(Filed March 14, 2005)

Before the Court are Plaintiffs' Application for Award of Fees, filed June 24, 2004 [#37]; Plaintiffs' Memorandum Brief on Attorney's Fees and Costs, filed June 24, 2004 [#38]; Opposition of Defendants Texas Workforce Commission, Texas Health and Human Services Commission, and Texas Department of Human Services to Plaintiffs' Application for Attorneys' Fees, filed July 6, 2004 [#41]; and Plaintiffs' Reply In Support of Fee Award and Alternative Motions, filed July 15, 2004 [#44]. Having considered the application, the entire case file and the relevant law, the Court now enters the following order.

I. Background

This lawsuit was brought as a challenge to rules adopted in 2003 by the Texas Workforce Commission ("TWC") limiting eligibility for Medicaid health coverage. These rules apply to poor adults with children who are receiving both cash assistance under the federal Temporary Assistance to Needy Families ("TANF") program and medical assistance under the federal Medicaid program. According to Plaintiffs, the challenged portions of the TWC rules would cut-off TANF recipients' Medicaid for reasons other than those permitted under federal law.

Plaintiffs filed in state district court an original petition and application for declaratory relief, temporary injunction, and temporary restraining order, pursuant to the Texas Uniform Declaratory Judgments Act ("TUDJA"), TEX. CIV. PRAC. & REM. CODE ANN. § 37.001, *et seq.* (Vernon 1997). The state district court issued a temporary restraining order that the parties agreed to extend until a state court ruling on the temporary injunction hearing set for January 20, 2004, or March 31, 2004, whichever first occurred.

On January 12, 2004, Defendants removed this case to this Court on the basis that the sole issue raised, whether the challenged state rules were in compliance with federal law, presented a substantial federal question. Plaintiffs filed an application for preliminary injunction with new affidavits, seeking a continuance of the preliminary injunction pending this Court's determination of the merits. On April 12, 2004 the undersigned entered an order granting Plaintiffs' preliminary injunction application. On June 10, 2004 the Court granted declaratory judgment for Plaintiffs, declaring certain TWC Rules

invalid, and entered a final judgment in favor of Plaintiffs. Plaintiffs' counsel have now submitted their request for fees and costs, supported by an evidentiary appendix.

II. Issues Raised

Plaintiffs move for recovery of "costs and reasonable and necessary attorneys' fees" pursuant to the TUDJA. Alternatively, Plaintiffs request the Court grant them relief from judgment, permit amendment of their pleadings to assert a cause of action under 42 U.S.C. § 1983, and issue a new judgment granting relief under section 1983 and awarding fees under 42 U.S.C. § 1988. Plaintiffs further maintain their requested award, totaling $270,011.11 in fees and costs, is reasonable, equitable and just. Not surprisingly, Defendants contend Plaintiffs are not legally entitled to recover fees and further contest the reasonableness of the amount requested.

III. Texas Uniform Declaratory Judgments Act

Generally, a prevailing party is not entitled to recovery of fees, absent explicit statutory authority. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602, 121 S. Ct. 1835, 1839 (2001). Claims for attorneys' fees must be made by motion specifying the statute, rule, or other grounds entitling the moving party to the award. FED. R. CIV. P. 54(d)(2)(B). In this case, Plaintiffs base their request for fees on the provision of the TUDJA permitting a court to "award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. However, the Fifth Circuit has clearly held the TUDJA is procedural to Texas courts and provides no

substantive right recognizable in federal court. *Oleander v. Compass Bank*, 363 F.3d 560, 567-68 (5th Cir. 2004) (TUDJA does not provide necessary substantive legal basis for awarding attorneys' fees in federal diversity action); *Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998) (same).

Plaintiffs argue this Court should ignore the holding in *Olander* for two basic reasons. First, they contend the case law on this issue has wrongly held the TUDJA to be procedural, rather than substantive.[1] However, this Court is clearly bound by existing circuit precedent, regardless of its purported merits. *See Anbaugh v. Y&H Corp.*, 380 F.3d 219, 224 (5th Cir. 2004) (argument contrary to prior precedent must fall). *See also Delgado v. Reef Resort Ltd.*, 364 F.3d 642, 644 (5th Cir. 2004) (noting intervening change in state statute or case law required to permit court to abandon existing circuit precedent.)

Plaintiffs also contend the failure to award them fees would confer an anomalous and unfair advantage on Defendants as a result of their removal of this case to federal court. The Court notes Plaintiffs did not, however, move to remand this case following removal. Once this case was removed, there is no question federal, rather than state, law governed the proceedings. *See* FED. R. CIV. P. 81(c) (these rules apply to civil actions removed to

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[1] According to Plaintiffs, once the Fifth Circuit is "apprized" of the Supreme Court precedent they maintain is dispositive of the issue, the "Fifth Circuit will doubtless follow the Supreme Court on the question at issue here." (Plf. Reply at 7) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S. Ct. 1612 (1975)). In contrast to Plaintiffs, the undersigned is highly doubtful the Fifth Circuit is unaware of Supreme Court precedent which dates back nearly thirty years.

federal courts from state courts and govern procedure after removal); *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 437, 94 S. Ct. 1113, 1123 (1974) (federal rules of civil procedure, as well as other provisions of federal law, govern mode of proceedings in federal court after removal); *Douglas v. NCNB Tex. Nat'l Bank*, 979 F.2d 1128, 1129 (5th Cir. 1992) (once state court action is removed to federal court, it is governed by federal, rather than state, procedural rules); *Walker v. F.D.I.C.*, 970 F.2d 114, 121 (5th Cir. 1992) (federal law controls course of proceedings from point of removal). Accordingly, Plaintiffs have not established they are entitled to recover fees under the TUDJA.

IV. Relief from Judgment

Alternatively, Plaintiffs seek from this Court relief from judgment under Rule 59(e) of the Federal Rules of Civil Procedure. They maintain the Court should vacate the current judgment, then permit them to replead their underlying complaint to proffer a new legal basis for this action. Specifically, Plaintiffs wish to amend their complaint to assert a claim under 42 U.S.C. § 1983. They contend, following their amendment, the Court could simply use its prior findings to enter judgment on this new claim, and permit them to recover their attorneys' fees under 42 U.S.C. § 1988 as the prevailing parties.

A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). It is not the proper vehicle for presenting "legal theories, or arguments that could have been offered or raised before the entry of judgment."

Templet v. HydroChem, Inc., 367 F.3d 473, 478 (5th Cir. 2004); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990). Rather, the rule "serve[s] the narrow purposes of slowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Wellman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). Thus reconsideration of a judgment after its entry is an extraordinary remedy to be used only sparingly. *Templet*, 367 F.3d at 478; *Clancy v. Employers Health Ins. Co.*, 101 F. Supp. 2d 463, 465 (E.D. La. 2000).

Plaintiffs characterize their request as seeking to prevent the manifest injustice of permitting Defendants to "escape liability" for attorneys' fees. Clearly, however, they are asking this Court for relief from judgment merely to assert a new legal theory. Significantly, Plaintiffs do not seek this extraordinary relief for the purpose of achieving greater or different substantive relief. Rather they unabashedly admit their only reason for the request is to obtain an award of attorneys' fees. This is precisely the type of wholly collateral issue which is not properly addressed in a motion for relief from judgment. *See F.C.C. v. League of Women Voters*, 468 U.S. 364, 373-74 n.10, 104 S. Ct. 3108 n.10 (1984) (issue of entitlement to "attorney's fees and costs" described as "wholly collateral" to judgment on the merit(s). *See also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175, 109 S. Ct. 987, 991 (1989) (In contrast to request for attorney's fees or motion for costs, motion for discretionary prejudgment interest does not "rais[e] issues wholly collateral to the judgment in the main cause of action"). Moreover, Plaintiffs totally fail to explain why they did not, or could not, have asserted this claim earlier. Accordingly, the undersigned finds Plaintiffs have failed to

establish they are entitled to relief from judgment under Rule 59.

V. Conclusion

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Application for Award of Fees [#37] is DENIED. SIGNED this 14th day of March 2005.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

CIVIL PRACTICE AND REMEDIES CODE
CHAPTER 37. DECLARATORY JUDGMENTS

§ 37.001. Definition

In this chapter, "person means an individual, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character.

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§ 37.002. Short Title, Construction, Interpretation

(a) This chapter may be cited as the Uniform Declaratory Judgments Act.

(b) This chapter is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

(c) This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

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§ 37.003. Power of Courts to Render Judgment; Form and Effect

(a) A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.

(b) The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.

(c) The enumerations in Sections 37.004 and 37.005 do not limit or restrict the exercise of the general powers conferred in this section in any proceeding in which declaratory relief is sought and a judgment or decree will terminate the controversy or remove an uncertainty.

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§ 37.004. Subject Matter of Relief

(a) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(b) A contract may be construed either before or after there has been a breach.

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§ 37.005. Declarations Relating to Trust or Estate

A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a

declaration of rights or legal relations in respect to the trust or estate;

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;

(3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or

(4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

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§ 37.006. Parties

(a) When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.

(b) In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.

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§ 37.007. Jury Trial

If a proceeding under this chapter involves the determination of an issue of fact the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

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§ 37.008. Court Refusal to Render

The court may refuse to render or enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding.

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§ 37.009. Costs

In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.

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§ 37.010. Review

All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees.

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§ 37.011. Supplemental Relief

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application must be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the

court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

Current through the end of the 2005 2nd Called Session of the 79th Legislature

(1)

Supreme Court, U.S.
FILED
JUL 27 2006
OFFICE OF THE CLERK

No. 05-1659

IN THE

SUPREME COURT OF THE UNITED STATES

SOILA CAMACHO, SONIA DENISE GROVER, TEXAS WELFARE REFORM ORGANIZATION, EL PASO COUNTY HOSPITAL DISTRICT d/b/a R.E. Thomason General Hospital,

Petitioners,

v.

TEXAS WORKFORCE COMMISSION, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, AND TEXAS DEPARTMENT OF HUMAN SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, in applying the nuanced approach required by prior decisions of this Court for determining whether the attorney's fees provision of the Texas Declaratory Judgment Act embodies a substantive state policy, correctly held that the discretionary fee-award provision of the statute does not reflect a substantive policy and therefore is procedural for *Erie* purposes.

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STATEMENT OF THE CASE

Petitioners brought a lawsuit against Respondents challenging rules adopted in 2003 by the Texas Workforce Commission which limited eligibility for Medicaid health coverage. These rules applied to adults with children who receive both cash assistance under the federal Temporary Assistance to Needy Families program and medical assistance under the federal Medicaid program.

Petitioners filed an original petition and application for declaratory relief, temporary injunctive relief, and a temporary restraining order in state court pursuant to Section 2001.038 of the Texas Administrative Procedure Act, TEXAS GOVERNMENT CODE § 2001.038, and the Texas Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.001, *et seq.* (Vernon 1997). The state district court issued a temporary restraining order that the parties agreed to extend until a state court ruling on the temporary injunction request. On January 12, 2004, Respondents removed this case to the federal district court for the Western District of Texas on the basis that the issue raised -- whether the challenged state rules were in compliance with federal law -- presented a federal question. Petitioners did not move to remand the case following removal. On June 10, 2004, the district court invalidated certain Texas Workforce Commission rules, and entered a final judgment in favor of Petitioners. The decision was affirmed on appeal.

Petitioners then filed an application under Fed. R. Civ. P. 54(d)(2) for attorney's fees in the district court, specifying the fee-award provision of TEX. CIV. PRAC. & REM. CODE § 37.009 of the Texas Declaratory Judgment Act as the statute entitling Petitioners to the award. Section 37.009 provides that "[i]n any proceeding" under that Act, the court "may" award such attorney's fees "as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. Petitioners argued that under principles of federalism

announced in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), and its progeny, the federal court was bound to apply the state statute.

On March 14, 2005, the district court denied the fee application. Pet. App. 12. The district court explained that a prevailing party is not entitled to recover fees, absent explicit statutory authority. Pet. App. 14. The court then held that the statutory authority upon which Petitioners based their request for fees -- the Texas Declaratory Judgment Act -- is a procedural state statute and "provides no substantive right recognizable in federal court." Pet. App. 14-15. The district court found the decisions of the Fifth Circuit in *Olander v. Compass Bank*, 363 F.3d 560 (5th Cir. 2004), and *Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208 (5th Cir. 1998) -- holding that the Texas Declaratory Judgment Act "is not substantive law" -- to be controlling precedent. 138 F.3d at 210. Pet. App. 14-15. Accordingly, the district court denied Petitioners' application for an award of attorney's fees.

On appeal, a unanimous panel of the Fifth Circuit affirmed the district court's ruling. The court of appeals held that Petitioners' claim for attorney's fees was foreclosed by the Fifth Circuit's prior precedent rule, because Fifth Circuit precedent directly on point -- *Utica*, and later *Olander* -- held that the Texas Declaratory Judgment Act is not substantive law. Pet. App. 2, 445 F.3d at 409. The court rejected Petitioners' argument that *Utica* is not binding because the *Utica* decision itself conflicted with earlier precedent of the Fifth Circuit. Petitioners also argued that *Utica* is inconsistent with *Erie* principles articulated in earlier Fifth Circuit decisions, and that *Utica's* analysis of the *Erie* issue was wrong in any event. Pet. App. 6-7, 445 F.3d at 411. The court of appeals noted that Petitioners failed to point to any decision prior to *Utica* that contradicted *Utica's* specific holding that the Texas Declaratory Judgment Act is procedural for *Erie* purposes. Pet. App. 6, 445 F.3d at 411.

The court of appeals also rejected Petitioners' argument that *Utica* conflicted with a prior Fifth Circuit decision, *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261 (5th Cir. 1997), holding that a different state attorney's fees law (not the Texas Declaratory Judgment Act) was substantive for *Erie* purposes. The court of appeals explained, first, that both *Ashland* and prior decisions of this Court recognize "that not all state attorney's fees laws are applicable in federal court under *Erie*," and that "[t]he Supreme Court has taken a nuanced approach in determining whether particular attorney's fees laws are procedural or substantive under *Erie*," and thus decisions such as *Ashland* "regarding a law not at issue here" did not undermine the specific holding in *Utica*. Pet. App. 7, 445 F.3d at 411.

Although the court of appeals held that it "need not go further to affirm the judgment of the district court," it went on "to explain why we believe *Utica*'s holding comports with general *Erie* principles." Pet. App. 7-8, 445 F.3d at 411-12. The court of appeals pointed out that the discretionary fee-award provision of the Texas Declaratory Judgment Act conflicts with the federal policy of the "American Rule" requiring parties ordinarily to bear their own attorney's fees, and that the Texas Declaratory Judgment Act discretionary fee-award provision "does not represent 'substantive policy'" of the State of Texas within the meaning of this Court's decision in *Chambers v. NASCO*, 501 U.S. 32, 51-52, 111 S. Ct. 2123 (1991). Pet. App. 8, 445 F.3d at 412. Accordingly, the court of appeals affirmed the district court's judgment that the Texas Declaratory Judgment Act is not substantive for *Erie* purposes. This petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

I. Petitioners Concede There Is No Conflict Among The Circuits And Improperly Ask This Court To Resolve An Essentially Fictitious Split Within The Fifth Circuit.

Petitioners do not point to any conflict among the federal circuits as to the question they believe is presented, which is itself unclear.[1] In fact, Petitioners acknowledge that no such conflict exists, and instead argue that conflicts between the circuits over "whether any particular state fee-shifting statute is substantive" are "unlikely," because federal litigation involving any given statute will normally occur only within the federal circuit that includes the state in question. Pet. at 24.

In the conceded absence of any split among the federal circuits, Petitioners attempt to argue that this Court should grant a writ of certiorari to resolve what they claim is an "internal split" among decisions within the Fifth Circuit. Pet. at 5, 24. Even if a true conflict did exist among decisions within the Fifth Circuit, Petitioners have plainly chosen the wrong procedure to seek a resolution of the

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[1] The petition vacillates as to the question Petitioners assert is presented. *Compare* Pet. at i ("Are discretionary state fee-shifting statutes substantive for *Erie* purposes?"), *with* Pet. at 11 ("The question presented in this case is whether a state fee-shifting statute is 'substantive fee shifting' for *Erie* purposes when the award it provides is part of the merits award, rather than a sanction for bad-faith litigation conduct."). Petitioners also misstate the Texas law in attempting to characterize a possible fee award as part of the "merits award," since it is clear that fee awards are entirely within the discretion of the trial court and are not even "dependent on a finding that a party 'substantially prevailed.'" *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996).

conflict. Petitioners should have sought resolution of the supposed conflict by seeking en banc review in the Fifth Circuit. That is the appropriate means by which to resolve a split within a circuit. *See* Fed. R. App. P. 35(a)(1) (providing that en banc hearing may be ordered when "necessary to secure or maintain uniformity of the court's decisions"). Petitioners did not seek en banc review.

This claim that a conflict exists is also overstated at best. It is true that the attorney's fee provision of the Texas Declaratory Judgment Act has been applied in two Fifth Circuit cases. *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595 (5th Cir. 2000); *In re Garza*, No. 03-40171, 2004 WL 249596 (5th Cir. Feb. 10, 2004).[2] However, in neither case did the Fifth Circuit make a specific holding that the fee-award provision of the Texas Declaratory Judgment Act is substantive for *Erie* purposes or offer any analysis of or citation to authority in support of applying the Texas Declaratory Judgment Act in federal court.

Instead, the opinions in those two cases reflect no more than that the parties apparently did not argue to the court of appeals that an *Erie* issue was presented with respect to the fee-award provision of the Texas Declaratory Judgment Act, and the panels did not address the *Erie* issue in those cases.

In the absence of a conflict among the circuits, or any reason why a supposed conflict among decisions within the Fifth Circuit should be resolved by this Court rather than a request for en banc consideration by the court of appeals, Petitioners are left only with the argument that there is a "compelling reason," Sup. Ct. R. 10, for this Court to address

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[2] The opinion in *Garza* is unpublished and therefore without precedential authority under Fifth Circuit local rule. *See* Fifth Circuit L. R. 47.5.4.

the status for *Erie* purposes of the discretionary attorney's fees provision of a single state statute, the Texas Declaratory Judgment Act. Plaintiffs point to no reason why this single statute is of such great importance as to meet that standard, and there is no such reason.

II. This Case Does Not Present An Appropriate Occasion For Consideration Of Any Question Relating To *Erie* Principles.

While no compelling reason exists to grant a writ of certiorari in this case, there is a strong reason for denying review. This case is a poor vehicle for consideration of any *Erie* question because the Fifth Circuit based its holding on the court's prior precedent rule. Under the Fifth Circuit's prior precedent rule, a panel is bound by circuit precedent unless a different result is unequivocally directed by controlling Supreme Court precedent. *See, e.g., Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001); *U.S. v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir. 1991); *Gandy v. Alabama*, 569 F.2d 1318, 1325 n.11 (5th Cir. 1978). In this case, the court of appeals found that Petitioners' claim for an award of attorney's fees was foreclosed by the court of appeals' prior decision in *Utica* holding that the Texas Declaratory Judgment Act is procedural for *Erie* purposes.[3] The court of appeals found that *Utica* was directly on point and Petitioners had failed to identify any prior decision that

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[3] Although two panels of the Fifth Circuit subsequent to *Utica* applied the Texas Declaratory Judgment Act in federal cases, the court found that neither of these decisions affected the precedential value of *Utica* even if they might be regarded as tacitly conflicting decisions (there was no *Erie* analysis of the attorney-fee provision of the Texas Declaratory Judgment Act in either case), because under the Fifth Circuit's prior precedent rule the earliest of conflicting panel decisions controls. Pet. App. 4, 445 F.3d at 410.

conflicts with *Utica's* specific holding. Pet. App. 7, 445 F.3d at 411. The court of appeals therefore affirmed the district court's decision on that ground.

Having done so, the court of appeals correctly stated that it "need not go further." Pet. App. 7, 445 F.3d 411. Because of the vigor of Petitioners' eagerness to re-argue the *Erie* issue, however, the court of appeals went on to explain why its prior decisions were consistent with "general *Erie* principles." Pet. App. 8, 445 F.3d at 412. The relatively brief discussion of *Erie* principles by the court of appeals was therefore in the nature of dicta not necessary for the resolution of the case. In light of the subsidiary importance of the court of appeals' discussion of *Erie* principles to the decision below, this case presents a poor vehicle for this Court's consideration of any *Erie* issue.

An additional consideration militating against review is the Petitioners' assertion that the *Erie* issue presented in this case is "a question of first impression." Pet. at 8. If that is true, then the Court should deny the writ of certiorari on that basis as well. The Court has long recognized the value of allowing legal issues to mature through the lower courts so that the Court may avail itself of the careful consideration of other courts before settling the matter, if necessary. *See, e.g., E. I. dePont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S. Ct. 965 (1977) (recognizing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals" prior to Supreme Court review); *U.S. v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568 (1984) (noting that Supreme Court review prior to multiple lower court consideration "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.").

III. The Court Of Appeals' *Erie* Analysis Was In Any Event Correct.

Although the court of appeals' discussion of general *Erie* principles was not necessary to decide the case, the court's analysis nevertheless is correct. The court correctly recognized that the Supreme Court has taken a "nuanced approach" in determining whether particular attorney's fees statutes are procedural or substantive under *Erie*. Pet. App. 7, 445 F.3d at 411. As stated in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991), the obligation of federal courts to apply state attorney-award rules "applies only to fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees." *Id.* at 52. Only where the fee-shifting provision is "part of a statutory liability which created a substantive right" should a federal court apply the state fee-shifting statute. *Id*. *See also, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31, 95 S. Ct. 1612 (1975) (application of state attorney's fees statute in federal court is limited to cases where the state statute "reflect[s] a substantial policy of the state"); *People of Sioux County v. Nat'l Sur. Co.*, 276 U.S. 238, 241, 48 S. Ct. 239 (1928) (Nebraska statute could be applied to award attorney's fees in a case removed to federal court because statute addressed "special classes of actions" in creating entitlement to recover attorney's fees by beneficiaries of insurance policies who bring actions to enforce obligations under an insurance policy, and thus embodied a substantive state policy to benefit specific category of litigants).

Applying these principles, the court of appeals correctly found that the Texas Declaratory Judgment Act attorney's fees provision did not embody any such "substantive policy." Pet. App. 8, 445 F.3d at 412. Fee awards are not limited to "certain classes of litigation," such as "actions to enforce an insurance policy." Pet. App. 9, 445

F.3d at 412, quoting *Chambers*, 501 U.S. at 52. To the contrary, the Texas Declaratory Judgment Act creates no substantive rights, but merely provides a "procedural device for deciding cases already within a court's jurisdiction." *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994). Moreover, the Texas Declaratory Judgment Act "does not tie fee awards to the outcome of litigation," or even require "a finding that a party 'substantially prevailed.'" Pet. App. 10, 445 F.3d at 412-13, quoting *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996).

The court's reasoning on this point is consistent with Supreme Court precedent holding that a proper *Erie* analysis inquires into whether a state rule is bound up with the rights and obligations created by state law and is so substantial a part of a state cause of action that application of the state rule in federal court is required to vindicate the state substantive right. *See, e.g., Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535-36, 78 S. Ct. 893 (1958). The discretionary fee-award provision of the Texas Declaratory Judgment Act is not bound up with any such state created substantive right, but rather merely makes fees available in some cases, on a discretionary basis, under a statute providing a procedural basis to bring an unlimited variety of actions already within the jurisdiction of the court.

In addition to correctly concluding that the Texas statute does not embody any "substantive policy" of the state, the court of appeals correctly found that the fee provision of the Texas Declaratory Judgment Act conflicts with federal policy, specifically the "American Rule" requiring parties ordinarily to bear their own attorney's fees, which is a rule that generally applies in federal court. Pet. App. 8, 445 F.3d at 412.

Petitioners erroneously attempt to argue that the "American rule" should be discounted because they assert it

is merely "a common law rule or practice," and therefore the rule can be modified by state legislatures and applied in cases in federal court unless and except to the extent Congress makes the American rule a matter of statutory law. Pet. at 13. In fact, Congress has made the American rule a matter of statutory federal law. The rule against awards of attorney's fees in federal court absent specific authorization under Fed. R. Civ. P. 54(d)(2)(B) or other federal law has been enacted into federal statutory law in the federal costs statute, 28 U.S.C. § 1920. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 255, 95 S. Ct. 1612 (1975) (explaining that "Congress has made specific provision for attorneys' fees under certain federal statutes, [but] it has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute."). In short, the federal rule against attorney's fees is statutory in nature, not a matter of common law, and therefore is controlling in cases in federal court absent a strong basis in *Erie* principles requiring its application of a rule embodying a contrary, substantive state policy.

In challenging the court of appeals' *Erie* analysis, Petitioners also claim that the court held that attorney's fees statutes are substantive if and only if awards are available to prevailing parties. Pet. at 6-8. This also mischaracterizes the decision of the court of appeals. The court's opinion does not adopt any such bright-line test. The court of appeals merely surveyed Fifth Circuit decisions following this Court's 1991 decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991), and observed that those cases found fee-shifting statutes limiting fee awards to prevailing parties to be substantive under *Erie*. Pet App. 9, 445 F.3d at 412. But the court explained that these decisions "reflect[] the more general policy concerns" underlying *Erie*, namely avoidance of forum shopping and inequitable administration of the laws. *Id.* The court of appeals did not purport to abandon that approach in its decision in this case. To the

contrary, it correctly recognized that a "nuanced approach" considering multiple factors is the proper approach for determining whether state attorney's fees laws are procedural or substantive under *Erie*. Pet. App. 7, 445 F.3d at 411.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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